CONDITIONAL DELIVERY OF DEEDS.

The delivery of a deed, or of any other instrument which takes effect by delivery, may be conditioned upon the performance of some act or the occurrence of some event. The purpose of this paper is to consider the nature and operation of such a delivery, with reference more particularly to deeds of conveyance, as distinct from deeds creating a contractual obligation, though the same principles are no doubt ordinarily applicable to both.

A conditional delivery is usually referred to as a delivery "in escrow," or it is said that an instrument conditionally delivered is delivered as an "escrow." These forms of expression have the sanction of centuries of usage, and yet it may be questioned whether they are not calculated to give a wrong impression as to such a delivery. The word "escrow" meant originally, it appears, a piece or roll of parchment or paper, and its use in this connection doubtless has reference to the fact that an instrument conditionally delivered is not immediately operative. But an instrument in the form of a deed, which is conditionally delivered, is delivered as a deed, an instrument capable of legal operation, and not as a mere piece of paper. Otherwise it could not become legally operative upon the satisfaction of the condition. In the case of a conditional delivery, a delivery in escrow, the maker of the instrument in effect says: "I now deliver this as my act and deed, provided such a condition is satisfied," and not "I now deliver this as a mere piece of paper, provided such a condition is satisfied." The use of the word "escrow" in this connection is, however, so thoroughly established that any question as to its propriety is necessarily futile, and I shall in this article use the expressions "conditional delivery" and "delivery in escrow" for the most part interchangeably.

The conception of a conditional delivery, a delivery in escrow, as ordinarily presented in the older English books, is of a transfer of the possession of the instrument to a third person, as custodian or depositary, with directions to him to hand it to the grantee or obligee named upon the satisfaction of the condition,[1] and so in this country the cases have tended to emphasize the matter of

[1]Perkins, Conveyancing, §§ 142-144; Sheppard's Touchstone, 59; 2 Bl. Comm. *307.

the physical transfer of the instrument. If, however, the delivery of a deed is, as appears to be generally agreed, merely the expression, either by word or act, of an intention that the instrument shall have a legal operation, conditional delivery would seem properly to be merely an expression of an intention that the instrument shall have a legal operation provided a certain condition is satisfied, and adopting such a view, the physical transfer or custody of the instrument becomes of minor importance. An absolute delivery can be made without a physical transfer of the instrument, and it is difficult to see why a conditional delivery cannot be so made. There are in England judicial expressions to the effect that it can.[2] The contrary view is a relic of the primitive formalism which attaches some peculiar efficacy to the physical transfer of the instrument, as involving a symbolical transfer of the property described therein,[3] a formalism, the partial persistence of which is presumably to be attributed to our retention of the expressions "deliver" and "delivery," which, in other connections, ordinarily have reference to a physical transfer.

The manual transfer of the instrument, which is ordinarily assumed to be essential to a conditional delivery, must, according to the authorities in this country, be to a person other than the grantee, it being held that if the grantor, intending to make a conditional delivery, hands the instrument to the grantee, there is necessarily an absolute delivery.[4] In England the older authorities are generally to the same effect,[5] but there are occasional modern

[2]See Gudgen *v.* Bessett (1856) 6 El. & Bl. 986; Xenos *v.* Wickham (1856) L. R. 2 H. L. 296.

[3]See 4 Wigmore, Evidence, §§ 2405-2420; 2 Pollock & Maitland, Hist. Eng. Law (1st ed.) 86, 190. Mr. Wigmore's discussion of delivery is most illuminating.

[4]Alabama Coal & Coke Co. *v.* Gulf Coal & Coke Co. (1910) 165 Ala. 304; Campbell *v.* Jones (1889) 52 Ark. 493, 6 L. R. A. 783; Mowry *v.* Heney (1890) 86 Cal. 471; Larsh *v.* Boyle (1906) 36 Col. 18; Newman *v.* Baker (1897) 10 Dist. Col. App. 187; Walker *v.* Warner (1908) 31 Dist. Col. App. 76; Duncan *v.* Pope (1872) 47 Ga. 445; Mays *v.* Shields (1903) 117 Ga. 814; Whitney *v.* Dewey (1905) 10 Ida. 633, 69 L. R. A. 572; McCann *v.* Atherton (1883) 106 Ill. 31; Robinson, Norton & Co. *v.* Randall (1912) 147 Ky. 45; Hubbard *v.* Greeley (1892) 84 Me. 340; Ward *v.* Lewis (Mass. 1827) 4 Pick. 518; Arnold *v.* Patrick (N. Y. 1837) 6 Paige, 310; Worrall *v.* Munn (1851) 5 N. Y. 229, 55 Am. Dec. 330; Gaston *v.* Portland (1888) 16 Ore. 255; Miller *v.* Fletcher (Va. 1876) 27 Gratt. 403, 21 Am. Rep. 356; Richmond *v.* Morford (1892) 4 Wash. 337; Dorr *v.* Midelburg (1909) 65 W. Va. 778; but see Stanley *v.* White (1896) 160 Ill. 605.

[5]They are cited in 13 Vin. Abr. *Fait*, (O); Norton, Deeds, 17; Halsbury's Laws of England, vol. 10, p. 388; see Co. Lit. 36a; Sheppard's Touchstone, 59.

dicta to the contrary.[6] That the mere physical transfer of the instrument should, in any jurisdiction, be allowed to override the grantor's explicit declaration of intention that the instrument shall not be immediately operative, is a striking illustration of the persistence of the primitive formalism before referred to.[7] An instrument may be handed to the grantee or obligee without effecting any delivery whatsoever,[8] and it is difficult to see why it cannot be so handed without effecting more than a conditional delivery. So far as the danger of misleading an innocent third person is concerned, the danger is as great when there is no delivery as when the delivery is conditional only. The view referred to has, by a number of courts, been repudiated in connection with bills and notes, with the effect of upholding a conditional delivery thereof in spite of a manual transfer to the payee,[9] and the same considerations in favor of its repudiation would seem to apply in the case of deeds of conveyance. A tendency to break in upon such a rule is indicated by decisions that it does not apply if the instrument shows on its face an intention that others than those who have executed it shall join in its execution before it shall become operative,[10] as well as by decisions that the grantor can hand the instrument to the grantee, to be in turn handed by the latter to a third person to hold it in escrow, without thereby rendering it immediately operative.[11]

---

[6]Watkins *v.* Nash (1875) L. R. 20 Eq. 262; London Freehold and Leasehold Property Co. *v.* Suffield, L. R. [1897] 2 Ch. 608, at p. 621; Hudson *v.* Revett (1829) 5 Bing. 368; Bowker *v.* Burdekin (1843) 11 M. & W. 128, 146.

[7]See 4 Wigmore, Evidence, §§ 2405, 2408. This writer remarks in reference to the case of Hawksland *v.* Gatchel (1599) Cro. Eliz. 835, which clearly decided that the delivery was conditional if so intended, although the instrument was handed to the obligee, that "the authority and vogue of Coke's and Sheppard's writings obscured and suppressed prematurely this progressive conception."

[8]Kenney *v.* Parks (1902) 137 Cal. 527; Oswald *v.* Caldwell (1907) 225 Ill. 224; Farmers' & Traders' Bank *v.* Haney (1893) 87 Ia. 101; Comer *v.* Baldwin (1870) 16 Minn. 172; Braman *v.* Bingham (1863) 26 N. Y. 483; Gaylord *v.* Gaylord (1909) 150 N. C. 222; Clark *v.* Clark (1910) 56 Ore. 218; *In re* Nicholls (1899) 190 Pa. St. 308; Dwinell *v.* Bliss (1885) 58 Vt. 353; Zoerb *v.* Paetz (1908) 137 Wis. 59.

[9]1 Daniel, Negotiable Instruments (6th ed.) § 68a; Norton, Bills & Notes (3rd ed.) 71.

[10]Shelby *v.* Tardy (1887) 84 Ala. 327; Ward *v.* Churn (Va. 1868) 18 Gratt. 801, 98 Am. Dec. 749; Wendlinger *v.* Smith (1881) 75 Va. 309, 40 Am. Rep. 727.

[11]Cherry *v.* Herring (1887) 83 Ala. 458; Fairbanks *v.* Metcalf (1811) 8 Mass. 230; Gilbert *v.* North American Fire Ins. Co. (1840) 23 Wend. 43, 35 Am. Dec. 543; Brown *v.* Reynolds (Tenn. 1858) 5 Sneed, 639; but see Braman *v.* Bingham (1853) 26 N. Y. 491 for a dictum *contra*.

Occasional decisions to the effect that an instrument cannot be regarded as conditionally delivered if it is handed to the grantee's agent[12] are based upon the assumption that such a manual transfer to the grantee's agent is in effect a transfer to the grantee himself. Such an assumption is justified, however, only when the transfer is to the grantee's agent as such; that is, the mere fact that for other purposes one is the grantee's agent does not render him such agent for the purpose of holding possession of the instrument, and it has accordingly been decided in a number of cases that there was a valid conditional delivery although the person to whom the instrument was handed, to hold until satisfaction of the condition, was for some purposes the agent of the grantee.[13]

Occasional statements to the effect that an instrument which has been handed to the grantor's agent cannot be regarded as having been delivered conditionally[14] appear to be open to question. They are, no doubt, an outgrowth of the view that there can be no conditional delivery if the grantor retains possession of the instrument, it being considered that possession by the grantor's agent is in effect possession by the grantor himself. Conceding that there can be no conditional delivery so long as the grantor retains possession of the instrument, a view which, as we have seen, appears somewhat difficult to sustain on principle, it does not seem that there is the equivalent of such a retention of possession when the grantor hands the instrument to another, merely because such other is his agent. That is to say, the fact that the person to whom he hands the instrument is the agent of the grantor for other purposes does not show that he is his agent as regards the custody of the document. The practical inconvenience of the view that there is in such case no conditional delivery would seem to be considerable. Suppose, for instance, the owner of land, having sold it, signs and seals a conveyance

[12]Duncan *v.* Pope (1872) 47 Ga. 445; Stewart *v.* Anderson (1877) 59 Ind. 375; Hubbard *v.* Greeley (1892) 84 Me. 340, 17 L. R. A. 511; Worrall *v.* Munn (1851) 5 N. Y. 229, 55 Am. Dec. 330; Ordinary *v.* Thatcher (1879) 41 N. J. L. 403, 32 Am. Rep. 225; Bond *v.* Wilson (1901) 129 N. C. 325.

[13]Ashford *v.* Prewitt (1893) 102 Ala. 264, 48 Am. St. Rep. 37; Dixon *v.* Bristol Sav. Bank (1897) 102 Ga. 461, 66 Am. St. Rep. 193; Price *v.* Home Ins. Co. (1893) 54 Mo. App. 119; Cincinnati etc. R. Co. *v.* Iliff (1862) 13 Oh. St. 235; Fertig *v.* Bucher (1846) 3 Pa. St. 308; Merchants Ins. Co. *v.* Nowlin (Tex. Civ. App. 1900) 56 S. W. 198; Blair *v.* Security Bank (1905) 103 Va. 762; Watkins *v.* Nash (1875) L. R. 20 Eq. 262.

[14]Day *v.* Lacasse (1892) 85 Me. 242; Van Valkenberg *v.* Allen (1910) 111 Minn. 333; Wier *v.* Batdorf (1888) 24 Neb. 83; *contra,* McLaughlin *v.* Wheeler (1891) 1 S. D. 497.

and hands it to his legal adviser, or other agent, with directions to hand it to the purchaser upon payment of the purchase money. If this is regarded as an absolute delivery by the vendor, the legal title passes, contrary to his intention, even before the payment of the purchase money, while if it is not regarded as a delivery, the conveyance would not pass title to the purchaser even on his payment of the price and the physical transfer of the instrument to him by the agent. It may be suggested that the agent in such case, on the payment of the purchase money, delivers the instrument in behalf of his principal, but delivery is a part of the execution of the instrument,[15] and in most, if not all, jurisdictions a formal power of attorney is necessary to enable one to execute a conveyance of land in behalf of another. It is almost inconceivable that a power of attorney is necessary to enable one to sign or seal an instrument in behalf of another, and is unnecessary to enable him to make delivery, the final expression of intention which serves to render the instrument actually operative.[16] Any suggestion that an agent acting under oral authority can deliver a deed of conveyance[17] appears to be based upon the misconception, so frequently appearing, that delivery means merely a manual transfer of the instrument.

The question whether, when the instrument has been handed by the grantor to a third person, it is to be regarded as having been conditionally delivered, is to be determined with reference to the language used by him, construed in the light of the surrounding circumstances, as showing the grantor's intention.[18] That is,

[15]See cases cited in "Words and Phrases," *s. v.* "Execute."

[16]That one cannot deliver a deed as agent for another without an authority under seal is explicitly decided in Hibblewhite *v.* M'Morine (1840) 6 M. & W. 200; Powell *v.* London & Provincial Bank, L. R. [1893] 2 Ch. 555. There is a strong implication to the same effect in the statement in Sheppard's Touchstone at p. 57, that "where one person delivers an instrument as the act of another person, who is present, no deed conferring an authority is requisite. But a person cannot, unless authorized by deed, execute an instrument as the act of a person who is absent."

[17]That an agent acting under oral authority can make delivery is in effect assumed in Furenes *v.* Eide (1899) 109 Ia. 511; Conway *v.* Rock (1908) 139 Ia. 162; Sturtevant *v.* Sturtevant (1886) 116 Ill. 340; Santaquin Min. Co. *v.* High Roller Min. Co. (1902) 25 Utah, 282; Spring Garden Bank *v.* Hulings Lumber Co. (1889) 32 W. Va. 357, 3 L. R. A. 583.

[18]Murray *v.* Stair (1823) 2 B. & C. 82; Bowker *v.* Burdekin (1843) 11 M. & W. 128; *In re* Cornelius' Estate (Cal. 1907) 91 Pac. 329; White *v.* Bailey (1841) 14 Conn. 271; Shults *v.* Shults (1896) 159 Ill. 654; Jackson *v.* Sheldon (1843) 22 Me. 569; Andrews *v.* Farnham (1882) 29 Minn. 246; Clark *v.* Gifford (N. Y. 1833) 10 Wend. 310; Gaston *v.* Portland (1888) 16 Ore 255; Bronx Inv. Co. *v.* National Bank of Commerce (Wash. 1907) 92 Pac. 380.

as absolute delivery is a question of the grantor's intention, so conditional delivery is a question of his intention. Such a manual transfer of the instrument to a third person is compatible with either an absolute delivery, a conditional delivery, or no delivery whatsoever; that is, the grantor may hand the instrument to a third person with the intention that it become immediately operative, that it become operative in case a certain condition is satisfied, or with no intention as to its becoming operative. A conditional delivery differs from an absolute delivery merely in the fact that it is subject to a condition, and it is in its nature as final as an absolute delivery.[19] For this reason it is difficult to yield our assent to occasional decisions and dicta that the grantor may retain a right of revocation, as it is called, by an express statement, when handing the instrument to a third person, that it is to become operative upon satisfaction of a condition unless he, the grantor, in the meantime indicates a desire to the contrary.[20] It is recognized that, after making a conditional delivery without expressly retaining any such right of control, the grantor cannot prevent the instrument from becoming operative upon the satisfaction of the condition,[21] and there is no reason why he should be allowed to retain a right of control by an express statement to that effect.[22] A delivery which the grantor can, at his option, treat as not a delivery, is incomprehensible.

One notion as to delivery in escrow which, though erroneous

[19]Consequently there is no conditional delivery, or any delivery whatsoever, if the grantor hands the instrument to a third person, with a statement that the instrument is not to become operative until he indicates a desire to that effect. Masters *v.* Clark (1909) 89 Ark. 191; Miller *v.* Sears (1891) 91 Cal. 282, 25 Am. St. Rep. 176; Loubat *v.* Kipp (1860) 9 Fla. 60; James *v.* Vanderheyden (N. Y. 1829) 1 Paige, 385.

[20]Woodward *v.* Camp (1853) 22 Conn. 457; (but see Grilley *v.* Atkins (1905) 78 Conn. 380); Lippold *v.* Lippold (1900) 112 Ia. 134, 84 Am. St. Rep. 331; Daggett *v.* Simonds (1899) 173 Mass. 340, 46 L. R. A. 332; Ruggles *v.* Lawson (1816) 13 Johns. 285, 7 Am. Dec. 375; Wilkins *v.* Somerville (1907) 80 Vt. 48; Henry *v.* Phillips (1912) 105 Tex. 459.

[21]Tharaldson *v.* Everts (1902) 87 Minn. 168; Seibel *v.* Higham (1909) 216 Mo. 121; Soward *v.* Moss (1899) 59 Neb. 71; James *v.* Vanderheyden (N. Y. 1829) 1 Paige, 385; Stanton *v.* Miller (1874) 58 N. Y. 192; Watson *v.* Chandler (1909) 133 Ky. 757; Nichols *v.* Opperman (1893) 6 Wash. 618; Anderson *v.* Messenger (C. C. A. 1907) 158 Fed. 250.

[22]That there is no delivery whatsoever if such right of revocation is retained, see Seeley *v.* Curts (Ala. 1913) 61 So. 807; Bury *v.* Young (1893) 98 Cal. 446; Wilson *v.* Wilson (1895) 158 Ill. 567, 49 Am. St. Rep. 176; Brown *v.* Brown (1876) 66 Me. 316; Cook *v.* Brown (1857) 34 N. H. 460; Roe *v.* Lovick (N. C. 1851) 8 Ired. Eq. 88; Williams *v.* Schatz (1884) 42 Oh. St. 47; Prutsman *v.* Baker (1872) 30 Wis. 644, 11 Am. Rep. 592; Williams *v.* Daubner (1899) 103 Wis. 521, 74 Am. St. Rep. 902.

on principle, and generally repudiated,[23] receives occasional expression,[24] is that such a delivery does not become operative by reason of the satisfaction of the condition, unless this is followed by a manual transfer of the instrument by its custodian to the grantee named therein, a "second delivery" as it is sometimes called. It might, of course, happen that such a transfer is a part of the condition on which the delivery is made, but that it is not ordinarily the grantor's intention that the operation of the instrument shall depend on the custodian's caprice or convenience in handing or not handing the instrument to the grantee is sufficiently obvious. The fact that, as is frequently the case, the grantor requests or directs the custodian to hand the instrument to the grantee upon the occurrence of the event specified, or even that the grantor is under the mistaken impression that such a manual transfer is necessary in order to render the instrument operative, is no reason for inferring an intention that the instrument shall not be operative unless such a transfer is made. The necessity of such a physical transfer of the instrument by its custodian cannot be regarded as involved in the occasional decisions that the grantee may, upon satisfaction of the condition, recover possession of the instrument from the custodian by suit.[25] The grantee is entitled to its possession because it is a muniment of his title, and not because its possession by him is necessary to render it legally operative. This notion of the necessity of a second delivery is evidently based on the primitive idea, before referred to, which still so frequently emerges, that the operation of a deed is dependent on the physical transfer of the instrument to the grantee or obligee.

[23]White Star Steamboat Co. *v.* Moragne (1890) 91 Ala. 610; Cannon *v.* Handley (1887) 72 Cal. 133; Couch *v.* Meeker (1817) 2 Conn. 302; Wellborn *v.* Weaver (1855) 17 Ga. 267, 274; Davis *v.* Clark (1897) 58 Kan. 100; Francis *v.* Francis (1906) 143 Mich. 300; Naylor *v.* Stene (1905) 96 Minn. 57; State Bank *v.* Evans (1835) 15 N. J. L. 155, 28 Am. Dec. 400; Craddock *v.* Barnes (1906) 142 N. C. 89; Shirley *v.* Ayres (1846) 14 Oh. 307; Ketterson *v.* Inscho (1909) 55 Tex. Civ. App. 150; Prutsman *v.* Baker (1872) 30 Wis. 644.

[24]See *e. g.* Fuller *v.* Hollis (1876) 57 Ala. 435; Fitch *v.* Bunch (1866) 30 Cal. 209, 212; Lindley *v.* Groff (1887) 37 Minn. 338; Taft *v.* Taft (1886) 59 Mich. 185, 60 Am. Rep. 291; Foster *v.* Mansfield (Mass. 1841) 3 Metc. 412; Stephens *v.* Rinehart (1872) 72 Pa. St. 434; 4 Kent's Comm. 454; 3 Washburn, Real Prop. § 2179; 16 Cyc. 561, n. 3.

[25]Tombler *v.* Sumpter (1911) 97 Ark. 480; Hardin *v.* Neal Loan & Banking Co. (1906) 125 Ga. 820; Guild *v.* Althouse (1905) 71 Kan. 604; Stanton *v.* Miller (1874) 58 N. Y. 192, 202, (1873) 65 Barb. 58; Baum's Appeal (1886) 113 Pa. St. 58, 65; Gammon *v.* Bunnell (1900) 22 Utah, 421 (*semble*); Schmidt *v.* Deegan (1887) 69 Wis. 300; Bronx Inv. Co. *v.* National Bank of Commerce (1907) 47 Wash. 566.

Closely connected in its nature and origin with this notion of the necessity of a second delivery is the contention, occasionally made, that if the custodian of the instrument hands it to the grantee before the satisfaction of the condition, the instrument becomes immediately operative. This contention has met with no favor, there being a considerable number of decisions that an instrument delivered in escrow does not thus become immediately operative by reason of such a transfer to the grantee of the possession of the instrument.[26] And this has been held to be so even as against a subsequent innocent purchaser for value from the grantee,[27] unless the grantor, in giving the grantee possession of the land in addition to relinquishing control of the instrument, was guilty of such negligence as to be precluded from asserting that the instrument was delivered merely in escrow.[28] The grantor may, however, waive the condition, as by recognizing the instrument as operative although the condition has not been satisfied,[29] and even his mere failure, for an unreasonable time, to take measures to cancel or otherwise nullify the instrument after it has passed into the grantee's control may preclude him from thereafter asserting, as against an innocent purchaser, that his delivery thereof was conditional.[30]

---

[26]County of Calhoun *v.* American Emigrant Co. (1876) 93 U. S. 124, 127; Ober *v.* Pendleton (1875) 30 Ark. 61; Heney *v.* Pesoli (1895) 109 Cal. 53; Jackson *v.* Rowley (1893) 88 Ia. 184; Stanley *v.* Valentine (1875) 79 Ill. 544; Daggett *v.* Daggett (1887) 143 Mass. 516; Black *v.* Shreve (1860) 13 N. J. Eq. 455, 458; Hinman *v.* Booth (N. Y. 1839) 2 Wend. 267; Powers *v.* Rude (1904) 14 Okla. 381; Bradford *v.* Durham (1909) 54 Ore. 1; Sharp *v.* Kilborn (1913) 64 Ore. 371; Schmidt *v.* Musson (1906) 20 S. D. 389; Morris *v.* Blunt (Utah, 1909) 99 Pac. 686.

[27]Dixon *v.* Bristol Sav. Bank (1897) 102 Ga. 461, 66 Am. St. Rep. 193; Jackson *v.* Lynn (1895) 94 Ia. 151, 58 Am. St. Rep. 386; Seibel *v.* Higham (1909) 216 Mo. 121 (*semble*); Harkreader *v.* Clayton (1879) 56 Miss. 383, 31 Am. Rep. 369; Boswell *v.* Pannell (Tex. Civ. App. 1912) 146 S. W. 233; Smith *v.* South Royalton Bank (1859) 32 Vt. 341; Everts *v.* Agnes (1855) 4 Wis. 343, 65 Am. Dec. 314, (1857) 6 Wis. 453; Franklin *v.* Killilea (1905) 126 Wis. 88.

[28]Bailey *v.* Crim (1879) 9 Biss. 95; Mays *v.* Shields (1903) 117 Ga. 814; Quick *v.* Milligan (1886) 108 Ind. 419, 58 Am. Rep. 49; Hubbard *v.* Greeley (1892) 84 Me. 340; Schurtz *v.* Colvin (1896) 55 Oh. St. 274; Blight *v.* Schenck (1849) 10 Pa. St. 285, 51 Am. Dec. 478.

[29]Jackson *v.* Badham (1909) 162 Ala. 484; Mays *v.* Shields (1903) 117 Ga. 814; Eggleston *v.* Pollock (1893) 38 Neb. 188; Truman *v.* McCollum (1866) 20 Wis. 179.

[30]Mays *v.* Shields (1903) 117 Ga. 814; Haven *v.* Kramer (1875) 41 Ia. 382; Connell *v.* Connell (1889) 32 W. Va. 319. That the grantor may have the instrument cancelled if prematurely handed by its custodian to the grantee, see Anderson *v.* Goodwin (1906) 125 Ga. 663; Bales *v.* Roberts (1905) 189 Mo. 49. That he may have its record enjoined, see Matteson *v.* Smith (1901) 61 Neb. 761.

A distinction in this regard is asserted in some of the books between an instrument delivered as an escrow, not to take effect as the grantor's deed until the satisfaction of a condition, and an instrument handed to a third person, as the grantor's deed, to be "delivered" to the grantee upon the satisfaction of a condition; it being said that, in the latter case, as distinguished from the former, the instrument is the grantor's "deed presently," and if the grantee obtains possession thereof even before the satisfaction of the condition it becomes immediately operative.[31] This distinction is strongly asserted in one case in this country,[32] and in a few others it is referred to in terms of approval.[33] In others it has been repudiated[34] or referred to as questionable.[35] The old books in which this distinction is asserted make it hinge upon the language used by the grantor or obligor in handing the instrument to the intended custodian, that is, upon whether the grantor handed it as his deed or as an escrow, it being regarded as his "deed presently" if referred to by him as his deed.[36] At the present day it is entirely immaterial whether the grantor refers to the instrument as an escrow or as his deed, and the fact that the grantor directs the person to whom he hands the instrument to hand or "deliver" it to the grantee only upon the satisfaction of a condition would ordinarily be regarded as showing that the original delivery of the instrument was conditional only. There is, it is submitted, absolutely no distinction between an instrument conditionally delivered as an escrow and one conditionally delivered as a deed, and neither can take effect until the condition is satisfied. There is, it is true, a dictum of Chief

[31]Comyn's Dig. *Fait*, A 3; Perkins, Conveyancing, §§ 143, 144; Sheppard's Touchstone, 59; Bushell *v.* Pasmore (1704) 6 Mod. 217. The distinction is recognized in Murray *v.* Stair (1823) 2 B. & C. 82, but apparently repudiated in Johnson *v.* Baker (1821) 2 B. & Ald. 440.

[32]Wheelwright *v.* Wheelwright (1807) 2 Mass. 447, 3 Am. Dec. 66.

[33]Hathaway *v.* Payne (1865) 34 N. Y. 92; Martin *v.* Flaharty (1892) 13 Mont. 96, 40 Am. St. Rep. 415; Ball *v.* Foreman (1881) 37 Oh. St. 132; Prutsman *v.* Baker (1872) 30 Wis. 644, 11 Am. Rep. 592; Wells *v.* Wells (1907) 132 Wis. 73.

[34]State Bank at Trenton *v.* Evans (1835) 15 N. J. L. 155, 28 Am. Dec. 400; Hall *v.* Harris (N. C. 1848) 5 Ired. Eq. 303.

[35]See Jackson *v.* Sheldon (1843) 22 Me. 569; Wellborn *v.* Weaver (1855) 17 Ga. 267, 63 Am. Dec. 235. "The distinction on this point is quite subtle, and almost too evanescent to be relied on." 4 Kent's Comm. 455, n.

[36]In Murray *v.* Stair (1823) 2 B. & C. 82, it is said that the word "escrow" need not be used to make a delivery in escrow, but no criterion for the application of the asserted distinction is indicated. See the judicious remarks of Hornblower, C. J., in State Bank at Trenton *v.* Evans (1835) 15 N. J. L. 158, 28 Am. Dec. 400.

Justice Shaw to the apparent effect that an instrument can be regarded as an escrow only when the delivery is conditioned upon the performance of some act by the grantee or obligee, while it is the grantor's "deed presently" if conditioned upon the occurrence of some other character of event,[37] but as he cites no authority and states no reason in support of the dictum, it may, it is submitted, be disregarded, in view especially of the fact that there are quite a number of cases[38] in which it is assumed without question that an instrument conditionally delivered is an escrow, although the condition does not involve the voluntary performance of any act by the grantee or obligee.

It has been asserted in several cases that there can be no delivery in escrow unless it takes place as the result of an actual contract of sale between the parties to the instrument, as, for instance, when the delivery is conditioned upon the payment by the grantee of an agreed price for the land. This view appears to have been first asserted in a California case[39] which, without naming any authority, stated this as one possible ground of its decision, and this was the only authority cited in a subsequent case in Wisconsin,[40] which explicitly decided that, in the absence of a valid and enforceable contract between the parties for the sale of the land, there could be no delivery in escrow. On the authority of this latter case and of one of the text books hereafter referred to, the same view was adopted, without discussion, by the Supreme Court of Utah,[41] and it was likewise adopted in Oregon[42] upon the authority of text book statements alone.

[37]Foster *v.* Mansfield (Mass. 1842) 3 Metc. 412, 37 Am. Dec. 154. The dictum is quoted with approval in Stephens *v.* Rinehart (1872) 72 Pa. St. 434; Landon *v.* Brown (1894) 160 Pa. St. 538; Davis *v.* Clark (1897) 58 Kan. 100; Grilley *v.* Atkins (1905) 78 Conn. 380; Taft *v.* Taft (1886) 59 Mich. 185, 60 Am. Rep. 291.

[38]Prewitt *v.* Ashford (1889) 90 Ala. 294; Conneau *v.* Geis (1887) 73 Cal. 176; McDonald *v.* Huff (1888) 77 Cal. 279; Raymond *v.* Smith (1825) 5 Conn. 555; Stone *v.* Duvall (1875) 77 Ill. 475; Shults *v.* Shults (1896) 159 Ill. 654; Fitzgerald *v.* Allen (1909) 240 Ill. 80; Millett *v.* Parker (Ky. 1859) 2 Metc. 608; Hoagland *v.* Beckley (1909) 158 Mich. 565; Price *v.* Home Ins. Co. (1893) 54 Mo. App. 119; Gilbert *v.* North American Fire Ins. Co. (N. Y. 1840) 23 Wend. 44, 35 Am. Dec. 543; Tooley *v.* Dibble (N. Y. 1842) 2 Hill, 641; Payne *v.* Smith (N. Y. 1882) 28 Hun, 104; Clarke *v.* Eureka County Bank (1903) 123 Fed. 922.

[39]Fitch *v.* Bunch (1866) 30 Cal. 208, approved in Miller *v.* Sears (1891) 91 Cal. 282, 25 Am. St. Rep. 176.

[40]Campbell *v.* Thomas (1877) 42 Wis. 437, 24 Am. Rep. 427.

[41]Clark *v.* Campbell (1901) 23 Utah, 569, 90 Am. St. Rep. 716, 54 L. R. A. 508.

[42]Davis *v.* Brigham (1910) 56 Ore. 41.

There are occasional dicta to the same effect in other States,[43] and various text books, on the authority of one or more of the cases above referred to, state this as settled law.[44] The Wisconsin case, above referred to, is the only one which undertakes to give any reason for this requirement of an auxiliary contract as essential to a conditional delivery, and the reason there given is that, in the absence of such a contract, the grantor would retain control of the instrument. This, however, is a purely gratuitous assumption. One who has made delivery of the instrument, as has been before remarked, has no further control over its operation, and this is so whether the delivery is absolute or conditional. The view referred to has no considerations of policy or convenience in its favor, and its necessary result is considerably to detract from the practical utility of the doctrine of conditional delivery. One objection to such a view would seem to lie in the fact that the doctrine of conditional delivery is not peculiar to conveyances of land, but is recognized also in connection with contracts under seal and also bills and notes. If there can be no conditional delivery of a conveyance in the absence of a contract of sale, that is, a contract to execute a conveyance, it would seem a reasonable inference that there can be no conditional delivery of a contract under seal or a promissory note unless there is a contract to execute such an instrument. There is no more reason for requiring an auxiliary contract in the one case than in the others. Yet it has never been suggested, so far as the writer knows, that there can be a conditional delivery of a contract under seal or a promissory note only when there is a legally valid contract to execute the contract or note. Another consideration adverse to the view referred to lies in the fact that, while the doctrine of delivery in escrow was recognized at least as early as the first half of the fifteenth century,[45] a purely executory contract, not under seal, was not then enforceable either in the common law courts,[46] or, it appears, in chancery.[47] That being the case, the requirement of an extraneous contract in order to

[43]Hoig *v.* Adrian College (1876) 83 Ill. 267; Nichols *v.* Oppermann (1893) 6 Wash. 618.

[44]16 Cyc. 562; 11 Am. & Eng. Encyc. Law (2nd ed.) 335; 1 Devlin, Deeds, § 313.

[45]See Y. B. 13 Hen. 4, 8; Y. B. 8 Hen. 6, 26; Y. B. 10 Hen. 6, 25.

[46]Ames, History of Assumpsit, 2 Harvard Law Rev. 1, 53; 3 Holdsworth, Hist. Eng. Law, 336-349; Pollock, Contracts (8th ed.) 148.

[47]Ames, Lectures on Legal History, 125-127, 143, 248; 2 Harvard Law Rev. 1, 53; 8 *Ibid.* 252; 1 Green Bag, 26.

make the delivery in escrow effective would, in the fifteenth or sixteenth centuries, have necessitated a contract under seal, and it seems hardly probable that such a delivery of an obligation or conveyance under seal was always accompanied by another obligation under seal calling for its execution. The subject of delivery in escrow is treated with considerable fullness in at least two of the earlier books[48] and there is not the slightest suggestion in either as to the necessity of such an auxiliary contract. It is, to say the least, somewhat extraordinary that an integral element in a doctrine dating from the commencement of the fifteenth century should have remained to be discovered by a California court in the latter half of the nineteenth.[49]

In addition to the cases above referred to which assert that the existence of a contract of sale is necessary in order that a conveyance may be delivered in escrow, there are to be found judicial suggestions to the effect that the "deposit in escrow," that is, the physical transfer of the instrument by the grantor or obligor to a third person, to hold until satisfaction of the condition, must be in pursuance of a contract between the parties.[50] Thus it has been said in one case that the making of a deed in escrow presupposes a contract pursuant to which the deposit is made[51] and in another that there must be a contract which prevents the grantor from recalling the deed.[52] The idea that, in the absence of a contract, the grantor can recall the deed is, as before remarked, without any support in principle, and there is, it is submitted, no more necessity of a contract in regard to its custody when the delivery is conditional than when it is unconditional.

Properly considered, conditional delivery, or delivery in escrow, is the same as any other delivery, except that it is subject to the satisfaction of a condition. After the condition has been satis-

[48]Perkins, Conveyancing, §§ 138-144; Sheppard's Touchstone, 58, 59.

[49]The view referred to forms the basis of an article on Conditional Delivery by Mr. Harry A. Bigelow in 26 Harvard Law Rev. at p. 565. The present writer regrets to find himself entirely out of harmony with Mr. Bigelow's treatment of the subject.

[50]See Fitch *v.* Bunch (1866) 30 Cal. *208; Wellborn *v.* Weaver (1855) 17 Ga. 267.

[51]Stanton *v.* Miller (1874) 58 N. Y. 192.

[52]Anderson *v.* Messenger (C. C. A. 1907) 158 Fed. 250, citing James *v.* Vanderheyden (N. Y. 1829) 1 Paige, 385; Cook *v.* Brown (1857) 34 N. H. 460; and Prutsman *v.* Baker (1872) 30 Wis. 644, 11 Am. Rep. 592, none of which three cases supports the statement in the slightest degree.

fied, there is an operative conveyance[53] which is to be regarded as having been delivered at the time of its conditional delivery, for the obvious reason that it was then, and then only, that it was delivered, though the title cannot be regarded as having passed until it actually did pass, that is, until the satisfaction of the condition. The grantor in effect says, at the time of handing the instrument to the intended custodian, "I now deliver this as my deed provided such a thing is done or occurs." That the delivery of the instrument and the passing of the title thus occur at different times is, it is conceived, the solution of the somewhat vague statements in the books, that, on the satisfaction of the condition, the deed will relate back to the time of delivery in order to uphold the deed, or to do justice, or to carry out the intention of the parties,[54] and it will serve to explain most of the decisions in this regard. The analogy may be suggested of an executory limitation contained in a conveyance *inter vivos,* which does not vest title until satisfaction of the condition precedent, but which, when the condition is satisfied, takes effect regardless of events or transactions which may have taken place since the time of the delivery of the conveyance. Accordingly, the fact that the grantor dies,[55] or becomes incapacitated,[56] between the time of the delivery of the instrument and the satisfaction of the condition, does not affect the validity of the instrument as a

[53]If the condition is satisfied, the operation of the conveyance is obviously not prevented by the fact that the grantor reacquires possession of the instrument. Wymark's Case (1593) 5 Co. Rep. 74; Regan *v.* Howe (1877) 121 Mass. 424; Baum's Appeal (1886) 113 Pa. St. 58.

[54]Price *v.* Pittsburg, Ft. W. & C. R. Co. (1864) 34 Ill. 13; Hoyt *v.* McLagan (1893) 87 Ia. 746; Baker *v.* Snaveley (1911) 84 Kan. 179; Taft *v.* Taft (1886) 59 Mich. 185, 60 Am. Rep. 291; Simpson *v.* McGlathery (1876) 52 Miss. 723; Frost *v.* Beekman (N. Y. 1814) 1 Johns. Ch. 288; Craddock *v.* Barnes (1906) 142 N. C. 89; May *v.* Emerson (1908) 52 Ore. 262; Shirley *v.* Ayres (1846) 14 Oh. 307, 45 Am. Dec. 546; Landon *v.* Brown (1894) 160 Pa. St. 538; Foxley *v.* Rich (1909) 35 Utah. 162; Spring Garden Bank *v.* Hulings Lumber Co. (1889) 32 W. Va. 357, 3 L. R. A. 583; Sheppard's Touchstone, 59, 72.

[55]Davis *v.* Clark (1897) 58 Kan. 100; Cook's Admr. *v.* Hendricks (Ky. 1827) 4 T. B. Mon. 500; Tharaldson *v.* Everts (1902) 87 Minn. 168; Webster *v.* Trust Co. (1895) 145 N. Y. 275; Wheelwright *v.* Wheelwright (1807) 2 Mass. 447, 3 Am. Dec. 66; Gammon *v.* Bunnell (1900) 22 Utah, 421; Jackson *v.* Jackson (Ore. 1913) 135 Pac. 201; Bronx Inv. Co. *v.* National Bank of Commerce (1907) 47 Wash. 566; Perryman's Case (1599) 5 Co. Rep. 84.

[56]Jennings *v.* Bragg (1595) Cro. Eliz. 447; Butler's Case (1591) 3 Co. Rep. 25; Wheelwright *v.* Wheelwright (1807) 2 Mass. 447, 3 Am. Dec. 66; Davis *v.* Clark (1897) 58 Kan. 100; Simpson *v.* McGlathery (1876) 52 Miss. 723; Perkins, Conveyancing, §§ 10, 140.

conveyance. And likewise, if the grantee dies during such interval of time, the title, or rather possibility of title, vests in his heir.[57] So the instrument is to be regarded as having been delivered at the time of the conditional delivery, as against an intermediate purchaser from the grantor, and is entitled to priority, unless such purchaser is a *bona fide* purchaser for value, and as such protected against a conveyance prior in time.[58] And as against a creditor of the grantor in favor of whom a lien accrues by attachment or judgment intermediate the delivery and the satisfaction of the condition, the grantee takes priority,[59] unless such creditor is, by the recording law of the particular jurisdiction, entitled to the protection accorded a *bona fide* purchaser.[60] On the other hand, since the title does not pass as of the time of the conditional delivery, a distress levied by the grantor before the satisfaction of the condition is valid.[61] And the grantor is entitled to the rents and profits of the land until the condition is satisfied,[62] except when, owing to the payment by the grantee of interest on the purchase price, the court, in the equitable adjustment of the rights of the parties, gives the rents and profits to the grantee.[63] And the grantor has been properly considered the owner of the land for the purpose of signing a petition for the organization of a drainage district,[64] as well as for the purpose of imposing upon him a liability for taxes.[65] Decisions to the

[57]Perryman's Case (1599) 5 Co. Rep. 84; Prewitt *v.* Ashford (1890) 90 Ala. 294; Stone *v.* Duvall (1875) 77 Ill. 475; Lindley *v.* Groff (1887) 37 Minn. 338; Sheppard's Touchstone, 59.

[58]McDonald *v.* Huff (1888) 77 Cal. 279; Whitmer *v.* Schenck (1906) 11 Ida. 702; Leiter *v.* Pike (1889) 127 Ill. 287; Wright *v.* Astoria Co. (1904) 45 Ore. 224; Wilkins *v.* Somerville (1907) 80 Vt. 48. As against equities accruing before the conditional delivery, the grantee in the deed conditionally delivered, like any other grantee, cannot claim as a *bona fide* purchaser for value unless he paid value before receiving notice. See Baker *v.* Snavely (1911) 84 Kan. 179.

[59]Whitfield *v.* Harris (1873) 48 Miss. 710; Simpson *v.* McGlathery (1876) 52 Miss. 723; Hall *v.* Harris (N. C. 1848) 5 Ired. Eq. 303; see Dettmer *v.* Behrens (1898) 106 Ia. 585; Shirley's Lessee *v.* Ayres (1846) 14 Oh. 307; *contra,* Jackson *v.* Rowland (N. Y. 1831) 6 Wend. 666; Wolcott *v.* Johns (1896) 7 Col. App. 360 (dictum); Taft *v.* Taft (1886) 59 Mich. 185, 60 Am. Rep. 291.

[60]See May *v.* Emerson (1908) 52 Ore. 262; Riddle *v.* Miller (1890) 19 Ore. 468.

[61]Oliver *v.* Mowat (1874) 34 Up. Can. Q. B. 472.

[62]Perkins, Conveyancing, § 10.

[63]Price *v.* Pittsburg R. Co. (1864) 34 Ill. 13; Scott *v.* Stone (1906) 72 Kan. 545.

[64]Hull *v.* Sangamon River Drainage District (1906) 219 Ill. 454.

[65]Mohr *v.* Joslin (Ia. 1913) 142 N. W. 981.

effect that, upon the satisfaction of the condition, the grantee's title relates back to the time of the delivery, for the purpose of validating an intermediate quit-claim conveyance by the grantee,[66] appear to be questionable, as are, it is submitted, decisions that, while a conveyance to a non-existent corporation is ordinarily invalid, such a conveyance is valid if its delivery is conditional upon the formation of the corporation named, and such a corporation is subsequently formed.[67]

As the death of the grantor before the satisfaction of the condition does not affect the validity of the delivery made by him, so one may make delivery subject to a condition which cannot, by its terms, be satisfied until after his death.[68] A judicial statement to the effect that if the condition cannot be satisfied until after the grantor's death, the instrument is necessarily testamentary in character,[69] appears to be based on the mistaken view that such a condition makes the transfer revocable so long as the grantor lives.

Not infrequently the grantor hands the instrument to a third person with a request or direction that he hand it to the grantee named upon the grantor's death, or otherwise indicates his intention that it shall become fully operative only upon his death. Such action has usually been regarded as involving a delivery of a conditional or quasi-conditional character, in that an instrument so delivered does not operate in exactly the same manner in which it would have operated had there been no reference to the grantor's death. There is, however, an obvious distinction between such a delivery and an ordinary conditional delivery. In the latter case the condition may never be satisfied, while in the former the condition, that of death, must necessarily be satisfied. A delivery conditioned upon a condition which cannot fail to be satisfied is, strictly speaking, not a conditional delivery. The

[66]Beekman *v.* Frost (N. Y. 1820) 18 Johns. 544, 9 Am. Dec. 246; Tooley *v.* Dibble (N. Y. 1842) 2 Hill, 641. That it does not relate back for this purpose, see 2 Williams, Vendor & Purchaser (2nd ed.) 1251, note (*d*), referred to in 10 Halsbury's Laws of England, 390, note (*m*).

[67]Spring Garden Bank *v.* Hulings Lumber Co. (1889) 32 W. Va. 357, 3 L. R. A. 583; Santaquin Min. Co. *v.* High Roller Min. Co. (1903) 25 Utah, 282. In these two cases a significance is imputed to the "second delivery" to which it is not entitled.

[68]Dettmer *v.* Behrens (1898) 106 Ia. 585, 68 Am. St. Rep. 326; Nolan *v.* Otney (1907) 75 Kan. 311; Stockwell *v.* Shalit (1910) 204 Mass. 270 (*semble*); Jackson *v.* Jackson (Ore. 1913) 135 Pac. 201; Gammon *v.* Bunnell (1900) 22 Utah, 421.

[69]Taft *v.* Taft (1886) 59 Mich. 185, 60 Am. Rep. 291, approved in Culy *v.* Upham (1903) 135 Mich. 131, 106 Am. St. Rep. 388.

courts might have taken this view, that such a delivery is not properly subject to any condition, and that consequently the instrument operates exactly as if there had been no reference to the grantor's death, but this they have not done. The question with which they have perhaps chiefly concerned themselves in connection with delivery of this character is whether the reference to the grantor's death renders the instrument testamentary, and they have decided, with approximate unanimity, that it does not so operate, provided, it is sometimes said, there is no right of revocation retained by the grantor. Such a right of revocation, however, would operate, it is conceived, not to make the instrument testamentary, but to negative the fact of delivery. In two States, apparently, it is considered that an instrument so delivered is testamentary if the grantor's intention is that title shall not pass until his death,[70] but this appears to assert an erroneous distinction between a deed and a will. An instrument which becomes immediately operative by a present delivery cannot be regarded as testamentary because the grantor's title is not to be divested thereunder until his death.

It being conceded that a delivery of this character, made with reference to the grantor's death, is a valid delivery, we have to consider in what way the reference to death affects the operation of the conveyance. The courts have not infrequently said that, upon such a delivery, the grantor's fee simple title is immediately vested in the grantee, subject to a life estate in the grantor.[71] Such a statement, taken literally, would mean that a conveyance so delivered creates two estates, a particular estate for life in the grantor and an estate in the nature of a remainder or reversion in the grantee. Thus to give to a conveyance in terms creating only an estate in fee simple, the additional effect of creating an estate for life in the grantor, does considerable violence to its language, and furthermore it gives to the matter of delivery an operation to which it is not entitled. The function of delivery is to determine whether the instrument shall be operative, not the estate or estates

[70]Felt *v.* Felt (1908) 155 Mich. 237; O'Brien *v.* O'Brien (1910) 19 N. D. 713. This is perhaps the Illinois view. Wilenou *v.* Handlon (1904) 207 Ill. 104; Russell *v.* Mitchell (1906) 223 Ill. 438; Benner *v.* Bailey (1908) 234 Ill. 79.

[71]Bury *v.* Young (1893) 98 Cal. 446; Grilley *v.* Atkins (1905) 78 Conn. 380; Kirkwood *v.* Smith (1904) 212 Ill. 395 (*semble*); Foreman *v.* Archer (1906) 130 Ia. 49; Meech *v.* Wilder (1902) 130 Mich. 29; Rowley *v.* Bowyer (1908) 75 N. J. Eq. 80; Arnegaard *v.* Arnegaard (1898) 7 N. D. 475; Maxwell *v.* Harper (1909) 51 Wash. 351; Prutsman *v.* Baker (1872) 30 Wis. 644.

which the instrument shall create when it does become operative. It may be questioned, however, whether by this statement anything more is intended than that the title will necessarily be vested in the grantee after the grantor's death, and that until then the grantor has the right to possess and enjoy the property. Another theory which may be suggested as to such a delivery with reference to the grantor's death is that, by reason of the language used at the time of handing the instrument to its custodian, the conveyance, though in terms creating a vested estate in fee simple in the grantee, creates merely a prospect of an estate, which will ripen into a vested estate only on the death of the grantor, as if a springing use had been created, the fee simple remaining in the meanwhile in the grantor. This theory is, however, objectionable as making a conveyance, which in terms creates a present estate, actually create, by reason of the mode of delivery, merely a possibility or prospect of an estate. It is no more the function of delivery to insert a condition precedent in the conveyance than it is to define the character of the estate conveyed. A third possible theory as to the operation of such a delivery, and, it is submitted, the most satisfactory one, is to regard such a delivery with reference to the grantor's death as but one case of conditional delivery, ignoring the fact that the condition named, that of death, is certain to be satisfied. This involves a fiction, it is true, but it is a beneficial fiction, as supplying an intelligible basis for discussion of the subject, and as bringing into a single category all the cases of qualified delivery, and so conducing to simplicity and harmony in this branch of the law. Applying this theory, in accordance with the views previously indicated, while the delivery is to be regarded as occurring at the time at which it actually does occur, the title does not pass, that is, the grantee does not acquire any estate, until the death of the grantor. The delivery is effective as against subsequent donees, grantees and attaching and judgment creditors, except in so far as they stand in the position of innocent purchasers for value.[72] And so the death of the grantee after the delivery

[72]To this effect appear to be Wittenbrock *v.* Cass (1895) 110 Cal. 1; Smiley *v.* Smiley (1887) 114 Ind. 258; Owen *v.* Williams (1887) 114 Ind. 179; Brown *v.* Austen (N. Y. 1861) 35 Barb. 341; Ranken *v.* Donovan (1901) 166 N. Y. 626, 46 App. Div. 225. But in Rathmell *v.* Shirey (1899) 60 Oh. St. 187, persons who gave credit to the grantor in ignorance of the conveyance so delivered were given priority, and in Ladd *v.* Ladd (1842) 14 Vt. 185, the widow by a marriage subsequent to such delivery was regarded as entitled to dower.

and before the grantor's death does not affect the validity of the delivery and, upon the grantor's death, an estate becomes vested in the grantee's heir.[73] On the other hand, no estate vests in the grantee or grantee's heir until the grantor's death, until, that is, the condition named is satisfied.

It is sometimes said of such a delivery with reference to the grantor's death, that the deed becomes operative upon its "delivery" by the custodian to the grantee after the grantor's death,[74] but, it is conceived, any such reference to a "second delivery," so called, meaning thereby a manual transfer by the custodian of the instrument to the grantee, introduces an entirely erroneous conception. Assuming, as is no doubt ordinarily the case, that the grantor intends the instrument to be fully effective upon his death even though the custodian does not hand the instrument to the grantee, such physical transfer to the grantee is absolutely immaterial, and the instrument becomes operative upon his death by reason of "the first and only delivery."[75] If the grantor intends such a manual transfer to be a part of the condition of the delivery, it must of course be made in order to render the instrument operative, but the manual transfer would not constitute the delivery of the conveyance, in the technical sense. This has already taken place, and moreover a deed of conveyance cannot be delivered after the death of the grantor.

HERBERT T. TIFFANY.

BALTIMORE.

[73]Stone *v.* Duvall (1875) 77 Ill. 475.

[74]Owen *v.* Williams (1887) 114 Ind. 179; Haeg *v.* Haeg (1893) 53 Minn. 33; Williams *v.* Latham (1892) 113 Mo. 165; Tooley *v.* Dibble (N. Y. 1842) 2 Hill, 641; Rosseau *v.* Bleau (1892) 131 N. Y. 177; Stonehill *v.* Hastings (1911) 202 N. Y. 115; Crooks *v.* Crooks (1879) 34 Oh. St. 610; Stephens *v.* Rinehart (1872) 72 Pa. St. 434; Wilson *v.* Wilson (1907) 32 Utah, 169; Ladd *v.* Ladd (1842) 14 Vt. 185.

[75]Per Hosmer, C. J., in Stewart *v.* Stewart (1824) 5 Conn. 317.